**U.S. Department of Labor**

**Office of Administrative Law Judges**
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DATE: January 14, 2000

CASE N0.: 1999-STA-00030

In the Matter of

**ASSISTANT SECRETARY OF LABOR**
**FOR OCCUPATIONAL SAFETY AND HEALTH**
Prosecuting Party

and

**WILLIAM ZURENDA**
Complainant

v.

**CORPORATE EXPRESS DELIVERY SYSTEMS**
Respondent

Appearances:

William Zurenda, Binghamton, New York, *pro se*

Steven D. Riskin, Esquire (U.S. Department of Labor, Office of the Solicitor), New York, New York, for the Prosecuting Party

Ronald G. Dunn, Esquire (Gleason, Dunn, Walsh & O'Shea), Albany, New York, for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

### I. Jurisdiction

This case arises from a complaint filed by William Zurenda (the "Complainant" or "Zurenda") under the employee protection provisions of section 405 of the Surface Transportation Assistance Act of 1982 ("STAA"), 49 U.S.C. §31105, and the implementing

regulations at 29 C.F.R. Part 1978. Section 405 of the STAA provides for employee protection from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. The case is before me on objections filed by Corporate Express Delivery Systems (the "Respondent" or "Corporate Express") to the findings and preliminary order issued by the Assistant Secretary of Labor for Occupational Safety and Health (the "Assistant Secretary") after investigation of Mr. Zurenda's complaint. 49 U.S.C. §31105(b)(2)(A), 29 C.F.R. §1978.105.

## II. Procedural History

Mr. Zurenda filed his complaint with the Assistant Secretary on February 9, 1999, alleging that Corporate Express had discharged him on February 8, 1999 in violation of the STAA for refusing to take his assigned vehicle on a run because the previous driver's vehicle inspection report noted a defective heater/defroster blower had not been repaired or signed off by a mechanic. ALJX 5.[1] After an investigation, the Regional Administrator for the Occupational Safety and Health Administration Region II issued a Secretary's Findings on April 16, 1999 that there was reasonable cause to believe that Zurenda's complaint had merit and a Preliminary Order that Corporate Express reinstate him to his former position, compensate him with back pay and expunge any reference to his protected activity and discharge from its records. ALJX 1-4. Corporate Express filed timely objections to the findings and preliminary order and requested a formal hearing before the Office of Administrative Law Judges by letter dated April 27, 1999. ALJX 7. Pursuant to notice, a hearing was conducted before me in Syracuse, New York on June 28-29, 1999, at which time all parties were afforded an opportunity to present evidence and argument. The Claimant appeared *pro se,* and appearances were made by counsel on behalf of Corporate Express and the Assistant Secretary acting as the prosecuting party pursuant to 29 C.F.R. §1978.107(a). Testimony was elicited at the hearing from Mr. Zurenda and from three witnesses who appeared on behalf of Corporate Express (Wayne Keefer, Donald Moyster and David McLaughlin), and documentary evidence was admitted as ALJX 1-11, CX 1-5 and RX 1-4. The Assistant Secretary's objection to Respondent's Exhibits RX 5 and RX 6 was sustained on the ground that these documents had not been properly authenticated, TR 448-450, and that ruling is hereby affirmed.[2] At the close of the hearing, the parties waived the time frames set forth in 29 C.F.R. §1978.109(a) for closing of the record and issuance of the Administrative Law Judge decision so that they would have an opportunity to submit post-hearing briefs. By agreement of the parties, August 25, 1999 was established as the deadline for submission of post-hearing briefs. The Assistant Secretary and the Respondent both timely submitted post-hearing briefs, and the

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[1] The documentary evidence admitted to the record will be referred to as "ALJX" for jurisdictional and procedural documents admitted by the Administrative Law Judge, "CX" for documents offered by the Complainant, and "RX" for documents offered by the Respondent.

[2] Two additional documents, a statement and supplemental statement made by the Complainant during the Assistant Secretary's investigation, were marked for identification as CX 6 and RX 7, respectively, but were not offered by any party. TR 472, 490, 520.

record was then closed.[3]

## III. Stipulations

The parties stipulated to the following findings:

> 1(a) Respondent Corporate Express is engaged in inter/intrastate trucking operations. The company maintains a place of business at 40-48 Corliss Avenue, Johnson City, New York 13790. In the regular course of business, Respondent's employees operate commercial trucks principally to transport commercial products.
>
> (b) In the regular course of this business, Respondent's drivers operate trucks having a gross weight rating in excess of 10,001 lbs.
>
> 2(a) Mr. Zurenda was hired as a driver of a commercial vehicle, to wit, a truck with a gross vehicle weight rating of 10,001 lbs.
>
> 3(a) On or about February 9, 1999, Mr. Zurenda filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him in violation of 49 U.S.C. 31105 (B)(I) of the STAA. This complaint is timely filed.

TR 12-13; ALJX 3. The parties' stipulations are adopted as findings.

## IV. Findings of Fact and Conclusions of Law

A. Background and Employment History

William Zurenda was employed by Corporate Express as a truck driver at its Binghamton office, which is actually located in Johnson City, New York, from September 1997 until his termination on February 8, 1999. TR 46-47, 131. He possesses a Class B commercial driver's license which is required for driving a truck weighing in excess of 26,000 pounds. TR 47 (Zurenda). His immediate supervisor was Wayne Keefer, the branch manager of the Binghamton office. TR 48, 131 (Zurenda), 258 (Keefer). He began work as a part-time driver, but was converted to full-time status after approximately 11 months. TR 48 (Zurenda). His hours of work, both as a part-time employee and after he converted to full-time status, were from 11:30 p.m. to 8:00 a.m., and his regular schedule as a full-time driver was Monday-Friday which meant that he finished his workweek at 8:00 a.m. on Saturday morning. Mr. Keefer worked a day shift and was not usually at the office when Mr. Zurenda began and ended his shift. TR 48-49 (Zurenda), 266 (Keefer). Mr. Zurenda's wage rate was $8.00 per hour when he began working

[3] Mr. Zurenda submitted a letter dated January 9, 2000 which appears not to have been served on the other parties and which has not been considered herein.

for Corporate Express, and he received an increase to $9.00 per hour in approximately October 1998. TR 51-52 (Zurenda). His other benefits included holiday pay and paid vacation time. TR 52 (Zurenda).

During his employment with Corporate Express, Mr. Zurenda was assigned as the third shift truck driver on the Binghamton to Binghamton portion of a round trip route which originated on weekday evenings in Syracuse, New York and traveled through Binghamton en route to Sears stores in Scranton, Wilkes-Barre and Allentown, Pennsylvania. The vehicle assigned to this route was truck #4230, a 24-foot box truck which Corporate Express leased from another firm, DeCarolis Truck Rental. Another driver brought the truck from Syracuse to Binghamton where it was supposed to arrive by 11:30 p.m. at the start of Mr. Zurenda's shift, but its arrival was frequently delayed. Mr. Zurenda would begin his shift at the Respondent's Binghamton office by getting the keys for the Sears stores, money for tolls and any necessary paperwork. Upon arrival of the truck #4230 in Binghamton from Syracuse, Mr. Zurenda would help another driver transfer items from truck #4230 to the other driver's truck. He would then load truck #4230 with additional items which were scheduled to be picked up in Binghamton for delivery to the three Sears stores in Pennsylvania. He then checked the load, put the paperwork for his truck in order and performed a pre-trip inspection of the truck. TR 49-50, 209-210 (Zurenda), 260-261 (Keefer).

Even before the events immediately leading up to his termination on February 8, 1999, Mr. Zurenda's employment with Corporate Express and his relationship with Mr. Keefer in particular were not completely harmonious. One year earlier, in January 1998, his employment was briefly terminated following an incident on January 2, 1998 when he left the Binghamton office without completing his route because the truck arrived late from Syracuse and his delayed departure would have prevented him from serving as a pallbearer at his Aunt's funeral the following morning. RX 2. While Mr. Zurenda and Mr. Keefer testified to different recollections of certain details, including whether Mr. Zurenda was fired or whether he voluntarily quit, TR 143-150 (Zurenda), 262-263 (Keefer), it is undisputed that he was quickly rehired. TR 263-264 (Keefer). In fact, Mr. Keefer confirmed that Mr. Zurenda was a good worker and that he was subsequently converted to full-time status because he was doing a good job. TR 333, 335. However, this rapprochement was short-lived as the relationship between Mr. Zurenda and Mr. Keefer clearly deteriorated through a series of events which began in or around January 1999 and culminated in Mr. Zurenda's termination on February 8, 1999.

B. Events Leading up to the Complainant's Termination

In the December 1998 - January 1999 time frame, Mr. Zurenda complained of several defective and/or unsafe conditions on truck #4230, including a cracked windshield, a broken wiper and a defective heater/defroster blower switch which shut off on high speed. TR 68, 248-249 (Zurenda), 268-269, 333-334 (Keefer). The problem with the heater/defroster blower was initially addressed by means of a temporary, makeshift arrangement which involved running exposed electrical wires inside the cab and installation of a toggle switch which apparently

bypassed the fuse box. TR 201-202 (Zurenda), 270-271 (Keefer). Sometime in late January 1999, truck #4230 was temporarily taken out of service by the lessor, DeCarolis, so that a more permanent repair could be made to the heater switch. TR 249-250 (Zurenda), 275-276 (Keefer). While truck #4230 was out of service for these repairs, another truck was substituted. TR 319 (Keefer).

On January 29, 1999, when the replacement truck arrived late in Binghamton around 1:00 a.m, the Syracuse-Binghamton driver informed Mr. Zurenda that he had been pulled over by the Johnson City Police Department because the truck's running lights were out. TR 56 (Zurenda). In accordance with Corporate Express policy, Mr. Zurenda called the Syracuse dispatcher who in turn contacted Mr. Keefer. TR 58 (Zurenda), 277 (Keefer). The parties agree that Mr. Keefer then came to the Binghamton office, but they differ as to what transpired after he arrived. According to Mr. Zurenda, he told Mr. Keefer that he could not drive the truck because there were no running lights or tail lights, and Mr. Keefer responded by asking him to drive. He then told Mr. Keefer that he refused to drive the truck in its present condition, and Mr. Keefer went into the office. TR 59, 168-172. Later, he asked Mr. Keefer what he should do, and Mr. Keefer told him that if he didn't want to drive the truck he should go home. He then informed Mr. Keefer that he had a problem in that his granddaughter was then living in his home and needed to have someone present with her at all times, and that the lateness of the truck's arrival would delay completion of his shift until well after 8:00 a.m. TR 60-61, 172. He stated that he then left the shop at 2:00 a.m. because the truck could not be driven in its present condition and because Mr. Keefer had done nothing at that point to correct the problem. TR 61. Mr. Zurenda further testified that had Mr. Keefer acted promptly and called in a mechanic at 1:30, he would have been able to make the run and return home in time to attend to his granddaughter. TR 136-137. As it was, he did not learn that Mr. Keefer called in the DeCarolis mechanic until the following morning when he returned to the Binghamton office. TR 168.

Mr. Keefer denied having any conversation with Mr. Zurenda when he arrived at Binghamton, and he denied ever asking or suggesting that Mr. Zurenda drive the truck without the lights being repaired. Instead, he testified that he immediately went into the office to call Syracuse so that he could get the DeCarolis number to call in a mechanic. TR 277-278, 288-289. He further testified that Mr. Zurenda came into the office while he was working on getting a mechanic and stated that he had family obligations and had to leave. Mr. Keefer stated that he responded that Mr. Zurenda also had an obligation to Corporate Express, but Mr. Zurenda said the he couldn't help that and left. TR 288-289. Mr. Keefer eventually did contact a mechanic who arrived sometime after Mr. Zurenda left and found no problem with the truck's lights. In this regard, the Respondent introduced a Vehicle Road Service Report which was completed and signed by a DeCarolis mechanic on January 29, 1999. The report states that the request for service was received at 2:10 a.m., that the mechanic was dispatched at "02.65" and that the mechanic could find no problem with the lights during an inspection of approximately 45 minutes duration. RX 1. The report does not indicate when the mechanic arrived at Binghamton or when the service call was completed. Mr. Keefer testified that the mechanic arrived about 45 minutes after he was called, that he (Mr. Keefer) had been called right around 1:30 and that the mechanic

had to arrive around 2:15. TR 286.[4]

After careful review of the record, including my observations of the demeanor of the witnesses, I find that Mr. Keefer's account of the early morning hours on January 29, 1999 is fraught by inconsistencies and contradictions and is, therefore, incredible. Mr. Keefer testified that he received a call at home from the Syracuse dispatcher that the truck did not have any lights and that he did not speak to Mr. Zurenda or personally inspect the truck before he went into the office to call Syracuse back to get the mechanic's number. TR 277-278. This defies credulity. If there was no need to speak to the driver first or inspect the truck himself, why wouldn't he have gotten the mechanic's number when the dispatcher called him at home or, better still, instructed the dispatcher to call the mechanic directly? His failure to take this obvious course of action only makes sense if he wanted to speak to Mr. Zurenda first. In addition, Mr. Keefer's testimony that he immediately contacted the mechanic when he arrived at Binghamton and that the mechanic arrived 45 minutes later at 2:15 p.m. is contradicted by the mechanic's report that the service call was not received until 2:10 p.m. On the other hand, the mechanic's report is entirely consistent with Mr. Zurenda's testimony that no call to a mechanic was made until after he left at 2:00 p.m. Accordingly, I credit Mr. Zurenda's testimony that Mr. Keefer spoke to him when he arrived at Binghamton and asked him to drive the truck before it had been inspected by a mechanic. I also credit Mr. Zurenda's testimony that Mr. Keefer did not inform him that a mechanic had been called before Mr. Zurenda went home at 2:00 a.m.

Mr. Zurenda returned to the Binghamton office at around 11:00 a.m. on January 29, 1999 to pick up his pay check which he normally would have received at 8:00 a.m. when he returned from his route to the Sears stores in Pennsylvania. He was summoned to Mr. Keefer's office where he was given a memorandum dated January 29, 1999 and entitled "Disciplinary Action" which he signed along with Mr. Keefer and the Binghamton assistant branch manager, Tom Heartache. TR 62-63 (Zurenda), TR 291-292 (Keefer). The disciplinary action memorandum contains a written warning for "Uncooperative and Unflexible [sic] Behavior" which is described as follows:

> On 1/28/99 (Thursday) 1:30am, you called your manager to inform him that the running lights on the vehicle were out, the mechanic was called to fix the lights. At 2:00am, you left the building indicating that you had other obligations. Your manager asked that you deliver the run – no other driver was available to perform your run. Unfortunately, delays such as this are going to occur. Your attitude during this incident is a pattern of other instances in the past which has [sic] been discussed with you. You were uncooperative and unwilling to work with your manager in any way. This shows a lack of teamwork which is very important in

[4] It is interesting to note that, after the mechanic reported finding nothing wrong with the truck's lights, Mr. Keefer suspected that the initial report of a problem may have been false, so he later called the Johnson City Police who confirmed that a Corporate Express truck had been stopped earlier that evening because it had no running lights. TR 290 (Keefer).

> our type of business.
>
> On Tuesday (1/26/99) morning, you called the Syracuse Branch upset that the truck was late in coming to Binghamton. A supervisor at Syracuse indicated that you were shouting and cursing at him indicating that the employees at Syracuse didn't know what they are doing while using vulgar language. This type of behavior towards co-workers and management personnel will not be tolerated. If you have a problem that can not be resolved, you should call your manager immediately.

CX 1. The memorandum concluded that the consequence for failing to correct this problem behavior would be further disciplinary action up to and including discharge from employment. Mr. Zurenda testified that Mr. Keefer told him at this meeting on January 29, 1999 that he would be fired if he ever refused to drive a truck again, TR 63, a threat which Mr. Keefer denies ever making. TR 296. On this point, I again credit Mr. Zurenda. The statement attributed to Mr. Keefer is entirely consistent with the January 29, 1999 disciplinary memorandum, and Mr. Keefer's denial is no more credible than his assertion that he never spoke to Mr. Zurenda or attempted to persuade him to drive the truck with the reportedly malfunctioning running lights before he called in the DeCarolis mechanic.

Regarding the January 26, 1999 incident described in the memorandum, Mr. Keefer testified that he knew that it had actually occurred because he spoke to the Syracuse dispatchers. However, he admitted that Mr. Zurenda had never shouted or cursed at him and that this alleged abusive behavior toward Syracuse personnel did not comport with his knowledge of and personal experience with Mr. Zurenda. TR 322-323. The Respondent offered a handwritten memorandum dated "2-1-99" from a Jim Bennett stating that Mr. Zurenda had called Syracuse on an unspecified occasion and started "yelling and cursing at Carl Miller and me." RX 4. Neither of these individuals was called to testify at the hearing. Mr. Keefer also acknowledged that Mr. Zurenda denied this conduct when they met on January 29, 1999, TR 292, 321, and the parties are in agreement that Mr. Zurenda did not work the shift which began at 11:30 p.m. on Tuesday, January 26, 1999 as he had been given the shift off so that he could attend an adoption hearing on Wednesday morning, January 27, 1999, TR 63-64 (Zurenda), 292-294 (Keefer). For his part, Mr. Zurenda testified that he had reported to work on January 25, 1999 and that he may have called the Syracuse office early in the morning of January 26 to report that the truck was delayed in arriving at Binghamton. TR 161-166. However, he denied that he ever screamed, yelled, cursed or used vulgar language at anyone in Syracuse as that is not his personal style. TR 64-65, 166. In my view, the credible evidence of record falls well short of establishing that Mr. Zurenda engaged in the abusive verbal conduct described in Mr. Keefer's January 29, 1999 disciplinary memorandum. I give little weight to the unsworn memorandum from Mr. Bennett which apparently was not even written until after the January 29, 1999 memorandum was issued to Mr. Zurenda, and there is simply no other evidence to support this allegation. In addition, I find that Mr. Zurenda's denial of any intemperate verbal conduct is corroborated his maintenance of a completely calm and civil demeanor during extensive and rigorous cross-examination at the

hearing as well as by Mr. Keefer's admission that he had never witnessed Mr. Zurenda behave in the manner described in the January 29, 1999 memorandum.

After this meeting, Mr. Zurenda attempted to contact Mr. Keefer's supervisor, Ralph Powers, and the Corporate Express safety officer, David McLaughlin, because he disagreed with the contents of the January 29, 1999 written warning. Although he left messages for both men, he did not receive any response, so he personally went to see Mr. Powers who was in Binghamton for a meeting on the third or fourth of February. He showed the warning to Mr. Powers who stated that he would have Mr. McLaughlin get in touch. TR 66-67 (Zurenda). Although Mr. Zurenda and Mr. McLaughlin had somewhat different recollections regarding such details as when they first spoke and whether they spoke on more than one occasion, they are in agreement that there was communication by telephone between them, and there is no significant discrepancy in their accounts of the substance of their telephone conversation(s).

Mr. Zurenda testified that he eventually had a single telephone conversation with Mr. McLaughlin which took place sometime between 10:30 a.m. and noon on Friday, February 5, 1999. TR 68, 245-246. Earlier that morning, he had returned to Binghamton at around 8:00 a.m. after completing his route and discovered that his check was not waiting for him as it normally was on Friday mornings. When Mr. Heartache and Mr. Keefer were unable to explain why his check was missing, he stated that he would file a complaint of harassment with OSHA or the Labor Board. TR 80-81 (Zurenda), 297-298 (Keefer). He stated that he suspected that the absence of his check was part of a campaign of harassment by Mr. Keefer because Mr. Keefer had been continually "finding something to gripe at me about, always finding, you know, some complaints" after he had gone home on January 29, 1999 following the incident involving the reportedly defective running lights. TR 81-82. It is undisputed that this issue was resolved and that Mr. Zurenda did receive the missing check later that afternoon. TR 80 (Zurenda), 298 (Keefer).[5] In the meantime, he had at least one lengthy conversation with Mr. McLaughlin which covered a number of issues which included the missing pay check, his concerns with repair and correction of problems and defects noted on the trucks he drove, his fear that he would be terminated for raising complaints about the safety of vehicles, his family obligations and the problems created by the delayed arrival of the truck from Syracuse, whether he was required to maintain a vehicle log book and his responsibilities with respect to reporting defects and unsafe conditions in the vehicle inspection reports. TR 68-74, 190-198 (Zurenda). Mr. McLaughlin recalled a series of two or three telephone calls on February 4-5, 1999 covering these same issues.

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[5] The Respondent's witnesses explained that Mr. Zurenda's check was not sent to Binghamton on February 5, 1999 due to an inadvertent error that occurred when a personnel clerk, who had been asked by Mr. McLaughlin to review Mr. Zurenda's personnel folder, saw the record of his prior termination on January 6, 1998 (RX 2) and mistakenly believed that he was no longer employed. TR 410-411 (McLaughlin), 298 (Keefer). While this explanation is less than fully convincing (*i.e.*, Mr. McLaughlin appeared somewhat agitated and uncomfortable while repeatedly insisting that the incident was simply due to a "clerical error"), the matter of the missing check is not of great import since it has not been alleged as a violation of the STAA.

TR 398-406, 410-412. Following his conversation(s) with Mr. Zurenda, Mr. McLaughlin prepared a memorandum which set forth the understanding they had reached regarding Mr. Zurenda's rights and obligations with respect to vehicle safety and which he transmitted to the Binghamton Office. TR 407-408, 435 (McLaughlin).

When Mr. Zurenda returned to the Binghamton office later in the afternoon of February 5th to retrieve his pay check, Mr. Keefer gave him a copy of a memorandum addressed to him from Mr. Keefer and Mr. McLaughlin. TR 77-80. This memorandum states,

> It has been brought to our attention that you have some concerns regarding the operation of the vehicles assigned to you to complete your assigned route. Please be advised that Corporate Express has a serious commitment to every employee's safety (Copy of Safety Policy enclosed), as well as for the safety of the general public at large. There should be no misunderstanding whatsoever that we do not condone taking a vehicle on the road when it not in good working order. Additionally, no disciplinary action will ever be taken against any driver for writing up a vehicle for an unsafe operating condition.
>
> The company also has a commitment to our customers, and cannot guarantee that vehicles will not be subject to an occasional breakdown. There are sometimes delays in the dispatching of route vehicles due to mechanical problems. If these delays present you with scheduling problems in your personal life, we can fully understand and respect your priorities. However, it may require the Company to switch to another driver without the same time constraints. Please do not misconstrue this as a punitive action. You have not in the past, nor will you be going forward, be penalized in any way for bringing safety issues to management's attention.
>
> As always, should you have any questions or comments regarding this matter, please feel free to contact either Mr. McLaughlin or myself at your convenience.

CX 2 at 1. Attached to the memorandum were two enclosures, the Respondent's Safety Policy and 49 C.F.R. §§ 392.7 and 396.13.[6] *Id.* at 2-3; TR 77-79 (Zurenda). Mr. Zurenda agrees that

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[6] 49 C.F.R. § 392.7 ("Equipment, inspection and use") provides that "No commercial motor vehicle shall be driven unless the driver thereof shall have satisfied himself/herself that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:

– Service brakes, including trailer brake connections.
– Parking (hand) brake.
– Steering mechanism.
– Lighting devices and reflectors.
– Tires.

the content of this memorandum is consistent with the understanding he reached during his conversation(s) with Mr. McLaughlin. TR 82, 199. However, he testified that when Mr. Keefer gave him the memorandum on the afternoon of February 5th, he (Keefer) repeated his warning of January 29th that he (Zurenda) would be fired if he ever refused to drive a truck again. TR 82, 248. Mr. Keefer stated that very little was said when he delivered the February 5, 1999 memorandum to Mr. Zurenda, and he specifically denied telling Mr. Zurenda that he would be fired if he ever refused to take a load again. TR 296-298. Based on my observation of the witnesses and their respective demeanor, and noting that I have discredited Mr. Keefer's denial that he threatened to fire Mr. Zurenda on January 29, 1999, I find that Mr. Keefer did tell Mr. Zurenda on February 5, 1999 that he would be fired if he ever refused to drive a truck again.

C. The Complainant's Termination

When he reported to work as scheduled for the start of his shift on the evening of February 5, 1999, Mr. Zurenda discovered that the keys for the Sears delivery stops on his route were not on the keyboard in the Binghamton Office where they were normally kept. He explained that he had been instructed by Mr. Keefer to always leave the keys on the board in the office when he returned from his route in the morning. He stated that he had placed the keys back on the board earlier that morning when he had returned from the previous night's route and that this was the first time that he had arrived at work to discover the keys missing. TR 84-86, 225. He then called the Syracuse dispatcher, as he had been instructed to do by Mr. Keefer, and advised that the keys were missing. He testified that he may also have mentioned to the dispatcher that there was no log book. TR 86-87.[7] The dispatcher called Mr. Keefer and told him that the driver had

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– Horn.
– Windshield wiper or wipers.
– Rear-vision mirror or mirrors.
– Coupling devices."

And, 49 C.F.R. §396.13 ("Driver inspection") provides:

> Before driving a motor vehicle, the driver shall: (a) Be satisfied that the motor vehicle is in safe operating condition; (b) Review the last driver vehicle inspection report; and (c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. The signature requirement does not apply to listed defects on a towed unit which is no longer part of the vehicle combination.

[7] Considerable testimony was elicited regarding the use of vehicle log books. Mr. Zurenda testified that he had been previously informed by another driver and by Mr. Keefer that he did not need to keep a log book because truck #4230 was a leased vehicle. TR 70-73, 215-217. He

no keys or log book. TR 299 (Keefer). Mr. Keefer went to the Binghamton Office and then to a DeCarolis Office in Kirkwood where he picked up several log books to bring back to the office. TR 88 (Zurenda), 301-302 (Keefer). The missing keys were never located, but another driver, Bob Merritt, had an extra key for Wilkes-Barre, and a plan was devised whereby Mr. Zurenda would modify his usual itinerary by going to Wilkes-Barre first, then Allentown which had a push-button lock and finally to Scranton where someone would be present by the time he arrived. TR 89 (Zurenda), 302 (Keefer).[8] Mr. Zurenda then helped Mr. Merritt finish loading his truck. By this time truck #4230 had arrived from Syracuse, and Mr. Zurenda began his pre-trip inspection of the vehicle. TR 89-91 (Zurenda).

The pre-trip inspection protocol required Mr. Zurenda to check the truck over and well as the previous driver's report for any noted defects. He then had to complete and sign an inspection form that he was satisfied with the condition of the truck. TR 91-92 (Zurenda).[9] When he examined truck #4230 after its arrival in Binghamton, Mr. Zurenda did not find an inspection report from the driver who had just driven the vehicle in from Syracuse, but he did review a report which had been competed earlier that day by another driver, David Behnke. TR 92-95 (Zurenda). The report is called a Driver's Daily Vehicle Inspection Report and contains the following instructions:

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further testified that he was not provided with a log book by Corporate Express and that he did not keep a log book until February 5, 1999 after he'd learned from Mr. McLaughlin that he was required to maintain a vehicle log for his route to the Sears locations in Pennsylvania. TR 71-72, 225-235. Mr. Keefer testified that he had obtained log books and made them readily available for drivers on a shelf in the Binghamton Office after Mr. Zurenda had raised a question when he was first hired as to whether drivers were required to maintain log books. There is no dispute between the parties that Mr. Zurenda was required to maintain a vehicle log book when driving the route from the Binghamton Office to the three Sears locations in Pennsylvania.

[8] Interestingly, both men take credit for this plan. Mr. Zurenda testified that Mr. Merritt told him that he had an extra key, that Mr. Merritt brought this key to Mr. Keefer in the office and that he came up with the idea of altering the route which he presented to Mr. Keefer. TR 89, 237-239. Mr. Keefer claimed that Mr. Merritt came to him with the extra key and that he crafted the solution after consulting with an official responsible for the Sears account, and he added that Mr. Zurenda initially did not like the idea of having to wait at Scranton for someone to open the store. TR 302-303. Based on my overall assessment of the relative credibility of these two witnesses, I find that Mr. Zurenda's account is more accurate, though it is understandable that Mr. Keefer might claim some ownership over the plan since it appears that he, not Mr. Zurenda, secured the necessary approval. TR 238-239 (Zurenda), 302 (Keefer).

[9] Mr. Zurenda testified that he conducted a physical inspection of truck #4230 on the evening of February 5, 1999, but he did not check the operating condition of the heater/defroster blower. TR 500-504.

> Driver, check items which are defective (X) and supply details about the defect in the "Remarks" section below. Use (✓) if inspection was satisfactory. Mechanic, review report and determine corrective action. Motor Carrier retain for 3 months. One copy must be carried on power unit.

CX 3. The inspection report form lists a series of truck systems from air lines to windshield wipers, including defroster and heaters, along with spaces next to each system for the driver to place either a "✓" or "X" and for a mechanic's comments. Below this list is a space for the driver's signature underneath a statement, which can be checked, that the condition of the vehicle is satisfactory. Below this space is another line for a mechanic's signature next to statements, which can also be checked, that the above defects are corrected or that the above defects need not be corrected for safe operation of the vehicle. Finally, there is a place for the driver to sign and date below a statement which reads, "I certify that I am satisfied that this vehicle is in safe operating condition and I have reviewed the last Vehicle Inspection report and verified that required repairs have been completed." *Id.* The report Mr. Zurenda found in truck #4230 on the evening of February 5-6, 1999 is dated "2-5-99" and has no notations next to any of the listed systems from either a driver or mechanic. There is a hand-written notation that the "Blower shut off on High also need PM" under the "Remarks" heading, and Mr. Behnke's signature appears below the "Condition of the above vehicle is satisfactory" statement which is not checked. There is no mechanic's signature, and Mr. Behnke did not sign the certification at the bottom of the report that he was satisfied that the vehicle is in safe operating condition, and that he had reviewed the last inspection report and verified that required repairs had been completed. *Id.*

Mr. Zurenda testified that he then went into the office, showed the notation in the inspection report concerning the defective blower to Mr. Keefer and asked him if the truck was safe to drive. He further testified that Mr. Keefer responded that the truck was safe, and that he requested that Mr. Keefer sign the inspection report, certifying that the truck was safe to drive without repair. According to Mr. Zurenda, Mr. Keefer refused to sign the report, stating he was not a mechanic, and he ordered Mr. Zurenda to either drive the truck or go home. Mr. Zurenda stated that the inspection report needed a mechanic's signature in order for him to drive, but Mr. Keefer told him to make up his mind – either drive or go home. TR 95-98. He understood from the warnings he'd received from Mr. Keefer on January 29, 1999 and February 5, 1999 that he would be fired if did not drive the truck and went home. TR 99. Mr. Zurenda testified that he then told Mr. Keefer that he would drive the truck but would go to the New York State Police barracks in Kirkwood where planned to have it inspected by the DOT (U.S. Department of Transportation) inspector stationed there to ascertain whether it was safe and legal to drive in view of the blower problem noted by Mr. Behnke in vehicle inspection report. TR 98, 496-499. He also testified that he conducted a physical inspection of truck #4230 on the evening of February 5, 1999, but he did not check the operating condition of the heater/defroster blower because it had already been written up. TR 500-506.

Mr. Keefer admitted that Mr. Zurenda showed him the inspection report with the remarks concerning the blower and that he had refused Mr. Zurenda's request that he sign it, but he denied

telling Mr. Zurenda he would be fired if he refused to drive the truck. Rather, he gave the following account on direct examination:

> A. I said, Bill, somebody's got to take this truck out, if you don't want to do it, I'll call another driver and . . .
>
> Q. Okay. And what did he say to you?
>
> A. And he said, well, here you sign it where it says mechanic, and I says, – oh, no, he said, here, you sign it here. I looked at it and I said, well that's a – it says, mechanic, I said, I'm not a mechanic, I said, I'm not going to sign it. So I refused to sign it.
>
> Q. What happened then?
>
> A. He went inside, he called Sears and he says, Wayne's making me take this truck out.
>
> Q. He called who?
>
> A. He called Syracuse base, he says . . .
>
> Q. Okay.
>
> A. . . . Wayne's making me take this truck out. And I – he was going – he mumbled something and he was going out through the warehouse, I said, Bill, I says, I can call in another driver, and he just kept right on going. You know, I assumed that he was going to out – I just thought he was unhappy, he was going to go out and do his run.

TR 303-304. Mr. Keefer also denied that Mr. Zurenda said anything to him about taking the truck to the State Police, stating instead that Mr. Zurenda only mumbled something unintelligible as he went out the door. TR 304.

Having found Mr. Zurenda to be a more credible witness than Mr. Keefer, I credit the former's version of the critical events on the evening of February 5-6, 1999. In this regard, I note that Mr. Zurenda answered questions consistently and directly even though he could reasonably have expected that some of his answers, such as his candid admission under cross-examination that he had not checked the heater/defroster blower, might be detrimental to his interests. In contrast, Mr. Keefer's testimony with regard to the events of February 5-6, 1999, as set forth above, was marked by hesitancy which I find indicative of a lack of candor and a tendency toward prevarication. Moreover, his denial that he threatened to fire Mr. Zurenda is directly contradicted by his statement on Mr. Zurenda's termination notice that he had previously warned Mr. Zurenda on January 29, 1999 and February 5, 1999. CX 5. Accordingly, I conclude that when Mr. Zurenda brought the inspection report with the remarks about the blower to his attention, Mr. Keefer responded that Mr. Zurenda had to make up his mind and either drive the truck or go home. I further conclude that it was entirely reasonable for Mr. Zurenda to understand Mr. Keefer's response in light of his prior threats to mean that he would be fired if he refused to drive truck #4230 on the February 5-6, 1999 shift.

Following his conversation with Mr. Keefer, Mr. Zurenda left the Corporate Express Binghamton office at approximately1:10 a.m. and drove the truck to the New York State Police barracks in Kirkwood which is approximately eight miles or a twelve minute drive from the Binghamton office. However, he discovered that there was no DOT inspector on duty at that time as he had expected. TR. 99-100 (Zurenda). He showed the vehicle inspection report to the state police officer on duty, and he explained that he did not want to drive the truck since he did not know whether it was safe because Corporate Express had not certified on the inspection report that the truck had been repaired or was safe to drive in its present condition. TR 100-101 (Zurenda). The state police officer then telephoned the Corporate Express office in Syracuse and advised that Mr. Zurenda was refusing to drive the truck because Corporate Express had not certified on the last vehicle inspection report that the truck was safe to drive. TR 101-102 (Zurenda). The police officer informed Mr. Zurenda that the Syracuse dispatcher said that the truck had been inspected and that it checked out OK, but Mr. Zurenda declined to rely on this representation because he had no proof as to what had been done. TR 493-496 (Zurenda). The Syracuse office called Mr. Keefer, who had gone home, and asked him to call the state police officer. TR 304-305 (Keefer). Mr Keefer called the state police barracks and told the officer on duty to instruct Mr. Zurenda leave the truck, its contents, keys, papers and cell phone with the state police and that he would come to pick up the truck. TR 102 (Zurenda), 305 (Keefer). Mr. Zurenda followed these instructions but first had state police officer initial and write the time, 1:30 a.m., on his Driver's Daily Vehicle Inspection Report which bears the next consecutive printed number after the number printed on the report signed by Mr. Behnke earlier on February 5, 1999. TR. 102, 114-118, 121-122 (Zurenda); CX-4. After speaking with the state police officer, Mr. Keefer called another Corporate Express driver with a CDL license, Donald Moyster,

and the two of them were driven by Mr. Heartache to the state police barracks where they retrieved the truck and completed the run without encountering any problems with the blower. TR 305-306, 340-343 (Keefer), 358 (Moyster).[10] Mr. Moyster confirmed that the blower shut off on the high setting, but said that the high setting was not needed. TR 359.

Mr. Zurenda reported for his next scheduled work shift on February 8, 1999. When he arrived at the Binghamton office, he was informed by Mr. Keefer that he had been fired for abandoning his job and leaving the truck at the state police barracks. TR 124-125 (Zurenda), 306 (Keefer). At this time, Mr. Keefer completed an Employment Termination Record which gives the following description of the incident that led to discharge: "Mr. Zurenda refused to work, because the blower (heater) didn't work properly when the switch was in high position. Bill abandoned his job with no regard for his supervisor, fellow workers, or Corporate Express." CX 5. Mr. Zurenda has not been employed since his discharge although he has sought employment with other trucking firms as a driver. He has collected unemployment insurance benefits at a rate of $147.00 per week, and he testified that he is ready and willing to return to work for Corporate Express; however, Corporate Express has not offered him reinstatement. TR 126-128.

D. Analysis

Section 405 of the STAA prohibits the discharge of, or discipline or discrimination against, an employee in the commercial motor transportation industry because the employee either files a complaint or initiates or testifies in a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or because the employee refuses to operate a vehicle in certain circumstances. That section states,

> (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because
> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (B) the employee refuses to operate a vehicle because
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a

[10] It is interesting to note that Mr. Keefer testified that he "was concerned about the truck and how bad this thing is. So I went along with Don on the trip. I made the run with him." TR 305.

> real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. §31105(a). The elements of a violation of the STAA's employee protection provisions are "that the employee engaged in protected activity, that the employee was subjected to adverse employment action, and that there was a causal connection between the protected activity and the adverse action." *Scott v. Roadway Express*, ARB Case No. 99-013 (July 28, 1999) (*Roadway Express*), slip op. at 7, quoting *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (*Clean Harbors*).

The Assistant Secretary contends that Mr. Zurenda's actions in refusing to drive truck #4230 on February 5-6, 1999 were protected under STAA section 405(b), 49 U.S.C. §31105(a)(1)(B)(i), because driving the truck without the Respondent's certification on the prior driver's inspection report that the truck was safe to drive without repair of the heater/defroster blower defect would have violated the requirements of a federal motor carrier safety regulation, specifically 49 C.F.R. §396.11(c)(1) which requires a commercial motor carrier to certify on a driver vehicle inspection report that a noted defect has either been repaired or that the vehicle is safe to operate without repair.[11] The Assistant Secretary also contends that Mr. Zurenda acted in conformity with 49 C.F.R. §396.13 which, as noted above, requires a driver to review the last vehicle inspection report and be satisfied that the vehicle is in safe operating condition. Assistant Secretary's Post-Hearing Brief at 9-10. Citing *Yellow Freight System, Inc. v. Martin*, 983 F.2d 1195, 1197-99 (2nd Cir. 1992) (*Yellow Freight*) (where the Court affirmed the Secretary's determination that a driver's refusal to operate a truck because the carrier refused to check and rectify a discrepancy in vehicle's identification number recorded in the inspection report was protected by the STAA since driving the truck under those circumstances would have violated 49 C.F.R. §§396.11 and 396.13), the Assistant Secretary submits that a preponderance of the evidence establishes that the Respondent unlawfully discharged Mr. Zurenda for engaging in activity protected by the STAA. *Id*. at 10-11. As relief, the Assistant Secretary seeks an order requiring the Respondent to: (1) reinstate Mr. Zurenda to his former position; (2) pay him back wages of $9.00 per hour for 40 hours per week from the date of discharge to the date of reinstatement with interest, less any interim earnings; and (3) expunge any adverse reference to his discharge from its records. *Id*. at 17-18.

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[11] 49 C.F.R. §396.11(c)(1) states, "Every motor carrier or its agent shall certify on the original driver vehicle inspection report which lists any defect or deficiency that the defect or deficiency has been repaired or that the repair is unnecessary before the vehicle is operated again."

Corporate Express concedes that Mr. Zurenda engaged in protected activity on January 29, 1999 when he called the Syracuse center to report that the truck did not have functioning running lights and on February 5-6, 1999 when he questioned Mr. Keefer about his right to decline to drive truck #4230 in light of the prior driver's vehicle inspection report. Respondent's Brief at 18. However, it argues that Mr. Zurenda and the Assistant Secretary have failed to prove a nexus between his protected activity and his termination. In this regard, it asserts that it immediately addressed and corrected the problem with the running lights and that Mr. Zurenda admitted that the real reason he was upset on January 29, 1999 was that the late arrival of the truck and the need to call in a mechanic interfered with his family obligations. Thus, it contends that Mr. Zurenda, Complainant can not prove that he was retaliated against in violation of the STAA for the events of that evening. *Id*. at 18-19. The problem with this argument is that it is premised on Mr. Keefer's discredited version of what transpired on that date. I have determined that Mr. Keefer did not immediately address and correct the problem with the running lights. Rather, he first attempted to persuade Mr. Zurenda to drive the truck in its present condition and only called in a mechanic *after* Mr. Zurenda refused to drive the truck as is and *after* Mr. Zurenda left the Binghamton office at 2:00 a.m. because of his family commitments. Corporate Express correctly points out that since a refusal to work based on personal reasons is not protected by the STAA, discipline imposed for such a refusal can not be found violative of the STAA. However, the record does not support a finding that Mr. Zurenda was lawfully disciplined because he walked off the job for purely personal reasons. Instead, the facts show that Mr. Zurenda left at 2:00 a.m. because he was unwilling to drive the truck with reportedly defective running lights and because Mr. Keefer's failure to do anything to correct the problem prior to 2:00 a.m. meant that he would be unable to complete his run in time to return home and fulfill his family responsibilities. Mr. Zurenda's refusal of Mr. Keefer's request that he drive the truck with the reportedly defective running lights is clearly protected by 49 U.S.C. §31105(a)(1)(B) because to drive under these circumstances would have violated 49 C.F.R. §392.7 which prohibits operation of a vehicle unless the driver has satisfied himself that the listed parts and accessories, including lights, are in good operating condition. Therefore, I find that there are both lawful (*i.e.*, leaving work for personal reasons) and unlawful reasons (*i.e.*, refusing to operate a truck with defective lights) for the January 29, 1999 written warning.

In a "dual motive" situation such as this, the burden of proof shifts to the respondent to show, by a preponderance of the evidence, that it would have taken the same adverse action even if the complainant had not engaged in any protected activity. *Clean Harbors,* 146 F.3d at 21-22; *Carroll v. United States Dep't of Labor,* 78 F.3d 352, 357 (8th Cir. 1996) (case decided under the employee protection provision of the Energy Reorganization Act); *Roadway Express,* slip op. at 8. Thus, Corporate Express must demonstrate that it would have issued the written warning to Mr. Zurenda even if he had never engaged in protected activity by refusing Mr. Keefer's request that he drive the truck with reportedly defective running lights. On this record, Corporate Express can not meet this burden. As set forth above, Mr. Zurenda credibly testified that had Mr. Keefer acted promptly to rectify the running lights problem by calling in a mechanic as soon as the running light problem was brought to his attention, the problem would have been resolved in sufficient time for him to complete his run and return home to attend to his granddaughter. I

recognize that it is somewhat speculative as to what would have happened if Mr. Keefer had chosen this prudent course instead of attempting to coerce Mr. Zurenda into unlawfully driving, but I am convinced that it is only fair that Corporate Express as the wrongdoer in this instance, not Mr. Zurenda, bear the risk of the uncertainty created by its own wrongful conduct. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."). Accordingly, I find and conclude that Corporate Express disciplined Mr. Zurenda in violation of 49 U.S.C. §31105(a)(1)(B) by issuing the January 29, 1999 written warning.[12]

Corporate Express next argues that Mr. Zurenda has "utterly" failed to prove that he was unlawfully retaliated against for his protected activity on February 5-6, 1999 because Corporate Express affirmatively gave him the option of not driving which he declined. Respondent's Brief at 19. More particularly, Corporate Express contends that Mr. Zurenda's actions in going to the state police did not amount to the filing of a complaint within the meaning of 49 U.S.C. §31105(a)(1)(A) since no safety complaint was ever filed. This much is not contested. While the Assistant Secretary's findings refer to a violation of "49 U.S.C. §31105(A)", ALJX 3 at 2, this appears to be a typographical error (*i.e.*, the reference should have been to a violation of section "31105(a)") since neither the Assistant Secretary nor Mr. Zurenda has alleged that he was unlawfully discharged for filing a complaint. Therefore, there is no basis for finding a violation of section 31105(a)(1)(A).

Corporate Express additionally contends that it has not been established that Mr. Zurenda was discharged in violation of 49 U.S.C. §31105(a)(1)(B) for refusing to drive past the state police barracks because there was not a genuine violation of a federal safety regulation at the time that he refused to drive. *Id*. at 19-20, citing *Yellow Freight*, 983 F.2d at 1199 ("To be meritorious on a 405(B) claim, a driver must show that the operation would have been a genuine violation of a federal safety regulation at the time he refused to drive – a mere good-faith belief in a violation does not suffice."). In support of this contention, Corporate Express makes several points. First, it asserts that the condition of the heater/defroster blower on February 5-6, 1999

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[12] It is noted that the Assistant Secretary did not address the legality of the January 29, 1999 disciplinary action in its post-hearing brief. However, such an omission does not preclude a finding of a violation based on this conduct since the January 29, 1999 memorandum was cited as a violation in the Assistant Secretary's findings and was fully litigated by the parties at the hearing. *See Nolan v. AC Express*, 92-STA-37 (Sec'y January 17, 1995) (where OSHA had only investigated a section 405(b) refusal to drive violation, ALJ did not err in considering a section 405(a) violation because the complaint had stated an allegation of a 405(a) violation). *See also Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1140 (6th Cir. 1994) (finding that the complaint gave adequate notice of claim of violation of section 405(a) even though OSHA determination letter referred only to section 405(b)).

would not have violated the applicable regulation, 49 C.F.R. §393.79,[13] because the evidence clearly establishes that the blower worked at all speeds other than high and that high speed was not necessary to supply adequate heat. *Id*. at 21-22. Second, it asserts that Mr. Zurenda can not establish that his refusal to drive on February 5-6, 1999 was supported by 49 C.F.R. §§396.11 or 396.13 because section 396.11 does not list either a heater or defroster among the parts or accessories a driver must check and because Mr. Behnke did not mark the heater or defroster as "defective" on the vehicle inspection report but rather only mentioned the blower under the "Remarks" heading. In the absence of a specific reference in section 396.11 to a heater or defroster, and in the absence of an indication of a "defect" by a prior driver in a vehicle inspection report, Corporate Express contends that Mr. Zurenda must establish that the failure of the blower on high speed affects safety – a hurdle he can not clear because he never independently checked the blower and because the state police declined to conduct any inspection. *Id.* at 22-26.

I agree with Corporate Express that this record can not support a finding that operation of truck #4230 on February 5-6, 1999 would have constituted a genuine violation of section 393.79 because the evidence shows that the blower operated satisfactorily on the lower speeds which was more than adequate for removing ice, snow, frost or condensation from the windshield as required by that regulation. However, I reject the contention that operation of truck #4230 on February 5-6, 1999 would not have run afoul of either section 396.11 or section 396.13. Both sections refer to defects or deficiencies listed in a vehicle inspection report. Section 396.11(c) in pertinent part places the following obligations on a motor carrier with respect to any defect or deficiency listed in a report:

> (c) Corrective action. Prior to operating a motor vehicle, the motor carriers or their agent(s) shall effect repair of any items listed on the vehicle inspection report(s) that would be likely to affect the safety of operation of the vehicle.

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[13] 49 C.F.R. §393.79 (Defrosting device), states,

> Every bus, truck, and truck tractor having a windshield, when operating under conditions such that ice, snow, or frost would be likely to collect on the outside of the windshield or condensation on the inside of the windshield, shall be equipped with a device or other means, not manually operated, for preventing or removing such obstructions to the driver's view: Provided, however, That this section shall not apply in driveaway-towaway operations when the driven vehicle is a part of the shipment being delivered.

> (1) Motor carriers or their agent(s) shall certify on the report(s) which lists only defect(s) or deficiency(s) that the defect(s) or deficiency(s) has been corrected of that correction is unnecessary before the vehicle is again dispatched.

Section 396.13, as previously noted, requires that a driver accomplish three things before operating a vehicle: first, the driver must be satisfied that the motor vehicle is in safe operating condition; second, the driver must review the last driver vehicle inspection report; and third, the driver must sign the inspection report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. According to Corporate Express, these regulatory requirements are inapplicable because Mr. Behnke had not placed an "X" next to the defroster and heaters lines on the inspection report to indicate a defect or deficiency; he only wrote his comment about the blower under the "Remarks" heading. This argument simply does not withstand scrutiny as it ignores critical facts. Mr. Behnke didn't just fail to place an "X" next to the defroster and heaters lines. He also did not check off that his inspection of the defroster and heaters was satisfactory per the instructions on the report form, and he did not check the box above his signature that the condition of the vehicle is satisfactory. There was no mechanic's certification on the inspection report, despite the Syracuse dispatcher's representation to the state police officer that the truck had been inspected and found to be OK, and Mr. Keefer, who admitted that he was concerned about the severity of the blower problem, refused to certify that the truck was safe to operate because he is not a mechanic. In addition, it is significant that Mr. Behnke's unelaborated remark that the blower shut off on high was made after truck #4230 had been returned to service by DeCarolis with the prior blower problem ostensibly corrected. Notwithstanding the patent ambiguities on the face of the inspection report that he reviewed when truck #4230 arrived in Binghamton and his immediate supervisor's hesitancy, Corporate Express contends that Mr. Zurenda should have readily understood that Mr. Behnke had not indicated that there was any defect or deficiency with the heater/defroster blower and that he only was alerting Corporate Express that there was a situation or idiosyncracy with the blower which did not affect safe operation of the vehicle. With the benefit of hindsight we now know from Mr. Moyster's testimony that the problem with the blower was similar to the prior problem which did not impair operation. Granted, Mr. Zurenda might well have arrived at the same conclusion had be personally inspected and tested the blower motor, but that clearly would not have addressed his legitimate concern over the lack of a mechanic's certification. The Second Circuit addressed precisely this type of situation in *Yellow Freight*:

> In retrospect, we now know that the error on the vehicle inspection report on 3 October 1989 was merely clerical. When Spinner was discharged that morning, neither the dispatchers nor Spinner had any tangible evidence to support such a determination. To have concluded at the time Spinner was terminated that the error was clerical and that the form . . . could safely be altered without infringing the regulations would have been pure speculation. To rule in hindsight that Spinner should have operated the vehicle in apparent violation of the regulations would serve neither good public policy nor the intent of Congress –

> particularly when the misunderstanding could have been clarified with the minimal cooperation of the dispatchers. We conclude that substantial evidence supports the findings and order of the Secretary on Spinner's 405(b) claim, and we find no basis on which to reverse.

983 F.2d at 1199 (footnote omitted). In my view, it would have required a similar degree of speculation for Mr. Zurenda to have concluded from the dearth of information available to him at the time that he refused to drive beyond the state police barracks that the mechanic's certification was not necessary. That is, he may have observed that the blower seemed to only malfunction on the highest setting, but he had no knowledge as to whether this condition, given the vehicle's unusual history of blower problems, constituted a defect or deficiency requiring a mechanic's certification within the meaning of section 396.13. As was the case in *Yellow Freight*, these uncertainties likely could have been resolved with minimal cooperation from Mr. Keefer. For example, he could have called Mr. Behnke who might have clarified whether he had mentioned the blower in his inspection report as a defect or deficiency. He also could have called the Syracuse dispatcher who might have told him that the blower had been checked by a mechanic and instructed him to sign the certification that the truck was safe to operate as a way of remedying the mechanic's oversight in not signing. On the other hand, he might have learned from making these inquiries that the nature of the blower problem was unclear so that a mechanic should have been called in. Instead, he did nothing other than attempt to pressure Mr. Zurenda into making the run without a mechanic's certification under threat of termination. On these facts, I find and conclude that the reference in the prior driver's inspection report to the blower shutting off on high constituted a defect or deficiency withing the meaning of section 396.11(c)(1) and section 396.13(c). Accordingly, I further find and conclude that Mr. Zurenda engaged in activity protected by section 405(b) of the STAA when he refused to drive truck #4230 beyond the state police barracks because the absence of a mechanic's certification that the blower problem reported by Mr. Behnke had been repaired or that the vehicle could be safely operated without repair constituted a genuine violation of a federal safety regulation at the time he refused to drive. *Yellow Freight*, 983 F.2d at 1199.

Finally, Corporate Express contends that even assuming that Mr. Zurenda is successful in proving that he engaged in protected complaint or refusal to drive activity, he is unable to establish that his firing was in retaliation for such activity in light of the fact that he had received written assurances (*i.e.*, in the February 5, 1999 memorandum drafted by Mr. McLaughlin, CX 2) that he had the right to report all perceived safety defects, to decline to drive where he felt that it was unsafe, and to decline to drive when a delay caused a conflict with his personal obligations. Given these assurances, Corporate Express maintains that Mr. Zurenda would not have been terminated had he simply refused to drive and that he was removed not because he engaged in protected activity, but because he chose to ignore the agreement he had reached with Mr. McLaughlin and instead resorted to self-help by driving to the state police and then abandoning the truck. This argument is disingenuous. While Mr. McLaughlin attempted to assure Mr. Zurenda that he would not be disciplined for raising safety concerns or for refusing to drive an unsafe vehicle, Mr. Keefer completely undermined, if not repudiated, these assurances when he

told Mr. Zurenda that he would be fired if he ever refused to drive again. Further, Mr. Zurenda did not lose the protection of the STAA by leaving the truck at the state police barracks. In the face of Mr. Keefer's lack of cooperation and threats, he attempted to remedy the apparent violation and complete his run by going to the state police where he hoped to obtain a DOT inspection. When that was not possible, he acted in conformity with the Respondent's policy by notifying the Syracuse dispatcher (through the state police officer) that he was refusing to drive the truck further without a mechanic's certification. Thus, I find that Mr. Zurenda complied with the requirement that a driver, where reasonably possible, inform his employer of the safety basis for his refusal to drive. *Compare LaRosa v. Barcela Plant Growers, Inc*., 96-STA-10 (ARB August 6, 1996), slip op. at 3 (refusal to drive not protected where driver simple failed to show up for work and never expressly informed employer that he was refusing to drive). *See also Assistant Secretary of Labor and Johnny E. Brown v. Besco Steel Supply*, 93-STA-30 (Secy. January 24, 1995), slip op. at 3; *LeBlance v. Fogleman Truck Lines, Inc.*, 89-STA-8 (Secy. December 20, 1989), slip op. at 12-13; *Perez v. Guthmiller Trucking Co.*, 87-STA-13 (Secy. December 7, 1988), slip op. at 25 n.14.

Based on the foregoing, I conclude that Corporate Express violated section 405(b) of the STAA when it terminated Mr. Zurenda on February 8, 1999 for engaging in protected activity on February 5-6, 1999.

## V. Remedy

Under the STAA, Mr. Zurenda is entitled to an order requiring Corporate Express to take affirmative action to abate the violation, reinstate him to his former position with the same pay and terms and privileges of employment, and compensatory damages, including back pay. 49 U.S.C. §§ 31105(b)(3)(A). As discussed above, Mr. Zurenda and the Assistant Secretary seek reinstatement, back pay and expungement of any records adversely referring to his protected activity. As requested, he is also entitled to interest on his back pay which shall be calculated in accordance with 26 U.S.C. §6621 (1988) which specifies the rate for use in computing interest charged on underpayment of Federal taxes. *Phillips v. MJB Contractors*, 92- STA-22 (Secy. October 6, 1992).

## VI. Order

1. Respondent Corporate Express shall offer Complainant William Zurenda reinstatement to his former position with the same pay and terms and privileges of employment.

2. Respondent Corporate Express shall pay Complainant William Zurenda back pay at $9.00 per hour ($360.00 per week) from February 8, 1999 until the date of reinstatement (or declination of offer), less authorized payroll deductions, with interest thereon calculated pursuant to 26 U.S.C. §§ 6621.

3. Respondent Corporate Express shall expunge from its personnel records the January

29, 1999 Written Warning and the February 8, 1999 Employment Termination Record and any other adverse or derogatory reference to Complainant's protected activities on January 29, 1999 and February 5-6, 1999.

SO ORDERED

Daniel F. Sutton
Administrative Law Judge

Dated: January 14, 1999
Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N. W., Washington, DC 20210 *See* 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996).